No. 02-649

In the Supreme Court of the United States

DEE-K ENTERPRISES, INC. AND ASHEBORO ELASTICS CORPORATION, PETITIONERS

v.

HEVEAFIL SDN. BHD., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Whether, in a case brought under the Sherman Act, 15 U.S.C. 1, alleging a global cartel organized outside the United States, the applicable jurisdictional test is governed by *McLain* v. *Real Estate Board*, 444 U.S. 232 (1980), or by *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764 (1993), when one or more defendants made substantial sales in interstate commerce of goods subject to the conspiracy.

2. Whether, assuming that *Hartford Fire* applies, the question of the cartel's effects on domestic markets is a question for the jury.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States. Although the court of appeals' decision applies the wrong test in concluding that the Sherman Act did not apply to the global price-fixing conspiracy in this case, the court's decision nontheless does not warrant this court's reviw in light of the insufficient development of the record below and the absence of any conflict in the circuits on the question presented.

STATEMENT

1. Petitioners are United States companies that purchase rubber thread, which is "used to make elastic fabric, bungee cords, toys, and other products." Pet.

App. 4a. In 1997, petitioners brought a class action against several producers of extruded rubber thread under Section 1 of the Sherman Act, 15 U.S.C. 1, seeking treble damages for overcharges they allegedly paid as a result of a price-fixing conspiracy. Petitioners named as defendants nine Malaysian, Indonesian, and Thai producers of rubber thread, four United States subsidiaries of Malaysian producers, and two United States independent distributors. After the district court denied class certification and "most defendants settled, declined to appear, or were dismissed," the case against the five Malaysian producers and the United States subsidiary of one of producers (Rubfil USA, Inc.) proceeded to an eight-day jury trial. Pet. App. 3a-5a.

Petitioners "introduced substantial evidence at trial of horizontal price fixing among the producers" during 1991-1996. Pet. App. 5a-6a. All of the price-fixing meetings occurred, and all of the rubber thread was produced, outside the United States. *Id.* at 6a. The conspiracy, however, was "aimed at a global market" including the United States. *Id.* at 10a. The Malaysian producers distributed rubber thread to the United States by (1) selling directly to larger American customers without using an intermediary; (2) selling to United States purchasers through an unincorporated, United States-division of respondent Heveafil Sdn. Bhd.; and (3) selling to domestic purchasers through wholly owned, United States-incorporated subsidiaries. *Id.* at 6a. Although the "record does not disclose the United States share of the global market," *ibid.*, respondents did not dispute petitioners' evidence that buyers in the United States purchased tens of millions of dollars' worth of rubber thread from the respondents during the conspiratorial period and that the United States division of one respondent (Heveafil Sdn. Bhd.)

sold over $7 million in rubber thread to customers in 31 States in one year. Pet. 4, 8-9.

The evidence at trial also showed that prices for rubber thread generally rose during 1991-1996. Petitioners contended that the price increases resulted from the conspiracy. Respondents argued, however, that the alleged price-fixing agreement was never implemented in the United States and that any increase in observed prices in the United States flowed from antidumping duties imposed by the Department of Commerce (pursuant to 19 U.S.C. 1673) and increases in the price of raw materials, particularly latex, used to manufacture rubber thread. Pet. App. 6a-7a.

The parties disputed the jury instructions concerning the jurisdictional reach of the Sherman Act. Respondents requested that the jury be required to find that the conspiracy had a "substantial effect" in the United States. Respondents relied on this Court's statement in *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764, 796 (1993), that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." At trial, petitioners objected "to the use of the terms 'substantial effect' in any of the jury instructions." Pet. App. 36a. The district court denied petitioners' objection and submitted the following two questions to the jury:

> 1. Was there a conspiracy * * * to fix the prices of extruded rubber thread, which was intended to have a substantial effect in the United States?
>
> 2. Did the conspiracy have a substantial effect in the United States?

C.A. App. 3665; Pet. App. 7a.

The jury answered the first question in the affirmative but the second question in the negative. The district court entered judgment for respondents. Pet. App. 7a.

2. Petitioners moved for a new trial pursuant to Federal Rule of Civil Procedure 59, arguing that the clear weight of the evidence was contrary to the jury's finding that respondents' conspiracy did not have a substantial effect on United States commerce. The district court denied the motion. Pet. App. 28a- 29a. The court reasoned that "[t]he *Hartford Fire* jury instructions were warranted and in accordance with the law." *Id.* at 29a. The court also found that the jury's finding that petitioners "failed to meet their burden" under *Hartford Fire* "is not against the clear weight of the evidence." *Ibid.*

The district court also denied petitioners' post-trial motion, pursuant to Federal Rule of Civil Procedure 50, that petitioners were entitled to judgment as a matter of law that the conspiracy had substantial domestic effects. Pet. App. 29a-30a. The district court denied the motion as untimely because petitioners had not moved for judgment as a matter of law at the close of evidence during the trial. *Ibid.*; see Fed. R. Civ. P. 50(a)(2) (requiring motion to "be made at any time before submission of the case to the jury").

3. The court of appeals affirmed. Pet. App. 1a-27a. It rejected petitioners' argument that the applicability of the Sherman Act to the respondents' conduct was governed by *McLain* v. *Real Estate Board*, 444 U.S. 232, 242 (1980), which held that, in antitrust cases involving *domestic* conduct, the Sherman Act applies if "the defendant's activity is itself in interstate commerce or, * * * has an effect on some other apprecia-

ble activity demonstrably in interstate commerce." The court of appeals held that, "[b]ecause the conspiracy involved primarily foreign conduct," the district court "did not abuse its discretion in applying the substantial-effect test" of *Hartford Fire*. Pet. App. 3a.

The court explained that, in determining whether to apply the jurisdictional test for foreign conduct under *Hartford Fire* or the jurisdictional test for domestic conduct under *McLain*, "a court should consider whether the participants, acts, targets, and effects involved in an asserted antitrust violation are primarily foreign or primarily domestic." Pet. App. 24a-25a. Applying that test to the facts of this case, the court of appeals concluded that "the price-fixing conspiracy [petitioners] alleged and proved was primarily 'foreign conduct' to which the *Hartford Fire* test properly applied." *Id.* at 27a. The court reasoned that "the bulk of the conduct * * * occurred abroad"; that "the agreements here were all formed entirely outside the United States"; that the "target of the conspiracy was a global market"; and that only two of the dozens of participants in the meetings held office in U.S. companies, and even those participants "also had important and in fact primary roles in Southeast Asian companies." *Id.* at 26a. The court further explained that, although respondents "sold rubber thread in the United States to United States consumers" and "a handful of faxes * * * describe pricing in the United States," those domestic "links to the United States are mere drops in the sea of conduct that occurred in Southeast Asia (and around the world)." *Ibid.*

In a footnote, the court of appeals also rejected petitioners' challenge to the district court's denial of a motion for a new trial under Rule 59. Pet. App. 7a. The court of appeals explained that respondents "provided

the jury with a good deal of evidence supporting the challenged finding [of no substantial effect], including evidence that increased latex prices or antidumping duties, or both, accounted for rubber-thread price increases." *Ibid.* The court accordingly concluded that "nothing about this case presents the 'exceptional circumstances' that might lead [the court] to conclude that the verdict was against the weight of the evidence." *Ibid.*

DISCUSSION

The court of appeals applied the wrong test in determining the jurisdictional reach of the Sherman Act in the context of a price-fixing conspiracy that involves both foreign and domestic elements. The relevant question is not whether such conspiracy involves "primarily foreign or primarily domestic" "participants, acts, targets, and effects," but rather, whether the conduct that allegedly injured the petitioners involves commerce within the reach of the Sherman Act. Notwithstanding the court of appeals' erroneous analysis, however, the decision does not merit this Court's plenary review. It does not conflict with any decision by another court of appeals regarding the scope of jurisdiction under the Sherman Act over a price-fixing conspiracy involving both foreign and domestic conduct. Moreover, relevant facts and arguments were not presented with sufficient clarity below to warrant this Court's review.

1. a. The threshold issue in determining whether the Sherman Act extends to cartel cases involving foreign activities is whether the conduct at issue involves domestic, import, or foreign commerce. The jurisdictional test for conduct involving domestic commerce is set forth in *McLain*, 444 U.S. at 242, which requires inter-

state activity or some more-than-minimal effect on interstate activity. The test for conduct involving non-import foreign commerce is set forth in the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a, which requires such foreign conduct to have a "direct, substantial, and reasonably foreseeable [domestic] effect" and that "such effect gives rise to a claim" under the Sherman Act.[1]

And the jurisdictional test for conduct involving import commerce is that discussed in *Hartford Fire*, 509 U.S. at 796, which requires intended and substantial domestic effects. *Hartford* cited with approval (*ibid.*) the Second Circuit's decision in *United States* v. *Aluminum Co. of America (Aloca)*, 148 F.2d 416, 444 (1945) (L. Hand, J.), which involved imports from Canada. The federal government's antitrust enforcement guidelines similarly reflect the view that allegations of conduct involving import commerce must meet the substantial effects test of *Hartford Fire*. U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement Guidelines for International Operations* § 3.1 (stating that *Hartford Fire* applies "[w]ith respect to foreign import commerce"), § 3.11 (stating that whether "[i]mports into the United States" "in fact produce the requisite substantial effects will depend on the facts of each case") (Apr. 1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,107, at 20,589 (1995).

As the court of appeals observed, this case alleges a conspiracy with "mixed foreign and domestic ele-

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[1] The United States agrees with the court of appeals (Pet. App. 11a) and the parties (Pet. 10 n.4; Br. in Opp. 21) that the FTAIA does not apply in this case because defendants' conduct at issue concerns import commerce and/or domestic commerce, which is expressly excluded from the reach of the FTAIA.

ments." Pet. App. 10a. The court of appeals held that, "[i]n determining which jurisdictional test (*Hartford Fire* or *McLain*) applies, a court should consider whether the participants, acts, targets, and effects involved in an asserted antitrust violation are *primarily* foreign or *primarily* domestic." *Id.* at 24a-25a (emphasis added). Because the court of appeals found the conspiracy here to involve "primarily 'foreign conduct,'" the court held that "the *Hartford Fire* test properly applied." *Id.* at 27a. That analysis was erroneous. The relative or absolute amount of foreign activity is immaterial if the aspects of the conspiracy giving rise to the plaintiff's injury sufficiently affect domestic commerce,[2] *i.e.*, "the defendant's activity is itself in [domestic] interstate commerce, or * * * has an effect on some other appreciable activity demonstrably in [domestic] interstate commerce." *McLain*, 444 U.S. at 242. In other words, the relevant question is not a relative one, but rather whether there is a domestic commerce component of the case that justifies an instruction under *McLain*, regardless of the relative amount of import commerce or foreign activity involved in the conspiracy.

Moreover, a focus on whether the conduct at issue is primarily domestic or foreign erroneously suggests that a case must be placed in a single category. The alleged conduct at issue may involve significant domestic com-

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[2] Unlike the government, private plaintiffs must demonstrate standing by "show[ing] that the [conduct] caused them an injury for which the antitrust laws provide relief," *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 584 n.7 (1986), and that the injury is "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful," *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

merce as well as import and foreign commerce. In particular, the court of appeals' observation (Pet. App. 26a) that the domestic links in a given case may be "mere drops in the sea of conduct that occurred" outside the United States is troubling. That statement might be read to mean that the Sherman Act would extend to a $10 million, purely domestic price-fixing cartel, but not extend to the domestic conduct of the same cartel if it expands to involve foreign producers, foreign meetings, and foreign sales to make it a $100 million global cartel. Certainly, conspirators should not be able to immunize the domestic effects of a conspiracy by broadening the conspiracy to include foreign markets.

b. In this case, respondents' sales appear to fall into three categories: interstate sales, direct imports into the United States to domestic purchasers, and foreign sales to foreign purchasers. Pet. App. 6a, 10a. Moreover, the conduct that gives rise to the petitioners' alleged injuries is limited to the first two categories. Although the facts are not entirely clear, there may well have been a sufficient domestic commerce component in the case to justify an instruction under *McLain*. One respondent, Rubfil USA, Inc., is a United States-incorporated subsidiary of a Malaysian producer, and made interstate sales of rubber thread from its office in North Carolina. Another respondent, Heveafil Sdn. Bhd., maintained an unincorporated division in the United States, which also made interstate sales of rubber thread from its office in North Carolina. *Id.* at 6a, 26a. Although the jury made no finding on the extent of such sales, and the court of appeals did not mention any evidence of such sales, it appears from record evidence cited by petitioners (Pet. 4, 8-9)—and not disputed by respondents—that interstate sales

from the respondents' North Carolina offices totaled in the tens of millions of dollars. If so, that evidence would be sufficient to establish jurisdiction under *McLain*. See 444 U.S. at 242, 246; accord *Fortner Enters.* v. *U.S. Steel Corp.*, 394 U.S. 495, 501-502 (1969) ($190,000 sufficient commerce to establish jurisdiction).

2. Notwithstanding the court of appeals' improper analysis, the decision below does not merit this Court's plenary review. As the court of appeals observed, "our increasingly global economy will undoubtedly produce * * * cases with mixed fact patterns, defying ready categorization as 'foreign' or 'domestic' conduct." Pet. App. 25a. The decision below, however, represents the first appellate decision analyzing what jurisdictional test applies when a price-fixing conspiracy involves significant foreign and domestic elements.

Petitioners argue (Pet. 14-15) that this Court's review is warranted to resolve a conflict with the decision below and *Carpet Group International* v. *Oriental Rug Importers Ass'n*, 227 F.3d 62 (3d Cir. 2000), and *United States* v. *Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997), cert. denied, 522 U.S. 1044 (1998). However, there is no clear conflict. Neither decision addresses whether a plaintiff must show substantial domestic effects from a price-fixing conspiracy that involves primarily foreign conduct.

In *Carpet Group*, the Third Circuit rejected the defendants' contention that *Hartford Fire* requires a plaintiff to show substantial domestic effects from a boycott by a group of United States importer/wholesalers of oriental rugs against rug manufacturers that directly sold to United States retailers and the retailers that directly purchased from those manufacturers at domestic trade shows. 227 F.3d at 73-75. The court of appeals explained that "*McLain* controls when subject

matter jurisdiction over domestic conduct is at issue," rejecting the defendants' reliance on *Hartford Fire* "because it dealt exclusively with the extraterritorial applicability of the Sherman Act to wholly foreign conduct." *Id.* at 75.

Although the Third Circuit's description, in dicta, of *Hartford Fire* as addressing "wholly foreign conduct" is different than the characterization of the court below of *Hartford Fire* as involving some domestic elements (see Pet. App. 17a-18a), there is no clear conflict calling for this Court's review. The facts of *Carpet Group* and this case are sufficiently distinct that it is not at all clear that the court below would not have joined the Third Circuit in applying *McLain* to the facts of *Carpet Group*. Nor does *Carpet Group* suggest how the Third Circuit would address the conspiracy involved here. The court below noted that "the price-fixing conspiracy [petitioners] alleged and proved was primarily 'foreign conduct.'" *Id.* at 27a. By contrast, the Third Circuit in *Carpet Group* held that "[t]he instant case deals primarily with conduct *in the United States.*" 227 F.3d at 75 (emphasis added). The Third Circuit simply had no occasion to consider the appropriate jurisdictional test when the conspiracy at issue involves some domestic conduct but foreign conduct predominates.

Petitioners similarly err in relying on the statement by the First Circuit in *Nippon Paper* that "*Hartford Fire* definitively establishes that Section One of the Sherman Act applies to wholly foreign conduct which has an intended and substantial effect in the United States." 109 F.3d at 9. As that statement suggests, *Nippon Paper* considered a conspiracy involving "wholly foreign conduct." *Ibid.* Because in *Nippon Paper* "the price-fixing activities * * * took place *entirely*" overseas, *id.* at 2 (emphasis added), the First

Circuit's decision does not address the appropriate jurisdictional test when the illicit conspiracy has both foreign and domestic elements.

3. Additional considerations further counsel against granting review in this case. Although petitioners objected to the district court's instruction under *Hartford Fire*, Pet. App. 36a, petitioners did not articulate to the district court that, under *McLain*, the Sherman Act applied to the alleged conduct to the extent that it involves domestic commerce. Rather, petitioners proposed a jury instruction that was *inconsistent* with *McLain* and, as a practical matter, similar to the questions that the district court actually posed to the jury. Thus, petitioners requested that the jury be instructed that the Sherman Act applied in this case only upon a finding that respondents' conspiracy actually affected prices in the United States:

> **Interstate And Foreign Commerce**
>
> In order to violate the Sherman Act, the activities of the conspirators must affect products that move in interstate or foreign commerce. Interstate commerce may include transportation of products into and out of the U.S., or across state lines.
>
> In this case, the plaintiffs have presented evidence that the defendants and co-conspirators engaged in a conspiracy to raise, control, maintain, stabilize or fix the price levels of Extruded Rubber Thread imported from outside the United States. It is not disputed that such products move in or into interstate commerce. This means that if you find that there was a conspiracy *which affected the U.S. price levels of Extruded Rubber Thread*, then it is estab-

> lished that the conspiracy affected U.S. commerce and the Sherman Act applies.

Plaintiffs' Proposed Jury Instruction No. 36 (Mar. 13, 2001) (emphasis added) (C.A. App. 3663); accord Plaintiffs' Proposed Jury Instruction No. 37 (Feb. 12, 2001) (C.A. App. 3664).

That instruction is not a correct statement of the law. The "proper analysis focuses, not upon actual consequences [from a conspiracy], but rather upon the potential harm that would ensue if the conspiracy were successful." *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 330 (1991). In other words, proof of a conspiracy and jurisdictionally significant sales of the product are sufficient to establish jurisdiction, without regard to an effect on domestic prices.

Not only was petitioners' proposed instruction erroneous, its focus on the conspiracy's effects on prices in the United States was not materially different from the instruction actually given, which required proof that respondents' conspiracy substantially affected United States commerce. Nor is it clear that petitioners would have prevailed had the court instructed the jury as proposed by petitioners. The jury found that respondents conspired and had the intent to substantially affect United States commerce, but that respondents' conduct did not actually have those effects. In other words, the jury appears to have agreed with respondents' defense that the conspiracy either was never implemented or at least was not the cause of the observed price increases of rubber thread in the United States. Thus, the jury's verdict appears to reject petitioners' argument that the conspiracy actually affected price levels in the United States.

Petitioners' failure to request an appropriate instruction under which it would have prevailed counsels against review by this Court. *City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) (dismissing a case as improvidently granted when "there would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested"); *United States* v. *Wells*, 519 U.S. 482, 488 (1997) ("we have treated an inconsistency between a party's request for a jury instruction and its position before this Court as just one of several considerations bearing on whether to decide a question on which we granted certiorari").

4. Petitioners also argue (Pet. 19-22) that, assuming *Hartford Fire* sets forth the relevant jurisdictional inquiry, the district court erred by submitting to the jury the issue of whether the conspiracy had the requisite substantial domestic effects, rather than deciding the matter itself as a matter of law. That question is not properly before this Court, as it was neither raised nor passed on below. Petitioners never argued that the issue of substantial effects should have not have been submitted to the jury. Rather, petitioners argued that the jury need not find "substantial" domestic effects, but only effects on domestic prices. Moreover, petitioners did not make a timely request under Rule 50 to the district court to decide the substantial effect question as a matter of law, Pet. App. 29a- 30a, and petitioners did not appeal the denial of their Rule 50 motion, *id.* at 7a & n.1.

Finally, even were the issue properly presented, this case would not be a suitable vehicle to determine how to satisfy the "substantial effects" test under *Hartford Fire*. As discussed, it is far from clear that a *Hartford Fire* instruction was necessary in this case in light of

the apparently significant domestic commerce involved. And, in any event, petitioners do not point to any appellate decision addressing what effects must be shown under *Hartford Fire*. Indeed, the court of appeals did not purport to define what constitutes a "substantial effect" under *Hartford Fire*, but rather found that, in this particular case, the jury's finding was not against the weight of the evidence. Pet. App. 7a n.1. Review of that fact-bound conclusion is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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